IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

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| ROBERT KOFSKY | : | CIVIL ACTION |
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| v. | : | |
| | : | |
| CHEMICAL RESIDENTIAL MORTGAGE | : | |
| CORPORATION and CHASE MANHATTAN | : | |
| MORTGAGE CORPORATION | : | NO. 98-0323 |

**MEMORANDUM AND ORDER**

HUTTON, J. October 28, 1999

Presently before the Court are Defendants' Motion for Summary Judgment (Docket No. 9), Plaintiff's Response to Defendants' Motion for Summary Judgment (Docket No. 15), Plaintiff's Sur Reply to Defendants' Motion for Summary Judgment ((Docket No. 18), and Defendants' Reply Memorandum of Law in Support of Motion for Summary Judgment (Docket No. 21).

## I. BACKGROUND

Having drawn all reasonable inferences in the light most favorable to the nonmovant, the pertinent facts are as follows. Robert Kofsky ("Plaintiff") brings this action against his former employers Chemical Residential Mortgage Corporation ("Chemical") and Chase Manhattan Mortgage Corporation ("Chase") (collectively,

the "Defendants").\[1] Plaintiff states three claims: (1) Breach of Contract (Count I); (2) Fraud (Count II); and (3) Pennsylvania Wage Payment and Collection Law ("WPCL") 43 Pa. Cons. Stat. Ann. § 260.1 et seq. (Count III).

Prior to January 1995, Plaintiff was employed by GMAC Mortgage ("GMAC"). While still at GMAC, Plaintiff discussed with Terry Williams ("Williams"), Chemical's National Retail Production Manager, the possibility of employment with Chemical. (Pl.'s Amend. Compl. ¶¶ 11-12). Williams told Plaintiff that he would earn commissions "based upon the overall production of builder business in the territory [Plaintiff] managed" and that such commissions would not be limited to only the builder business he produced directly. (Pl.'s Amend. Compl. ¶ 12).

Plaintiff interviewed with Chemical on December 20, 1994. (Pl.'s Amend. Compl. ¶ 13). In a letter dated January 4, 1995, Chemical offered Plaintiff employment.\[2] (Pl.'s Amend. Compl. ¶ 14). Plaintiff responded to Chemical's letter by memorializing his understanding of his entire employment agreement in a two page document which he subsequently provided to Chemical upon acceptance of its employment offer. Neither Chemical's offer letter nor

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[1]/ In April 1996, after Plaintiff was hired by Chemical, the parent companies of each Defendant merged and the resulting entity operated under the Chase name. Therefore, while Plaintiff was first hired by Chemical, he was employed by Chase post-merger.

[2]/ Chemical's letter expressly states that Plaintiff's employment at Chemical was to be at-will and that it reserved the right to change Plaintiff's terms and conditions of employment. (Def.'s Ex. 3). Moreover, Plaintiff acknowledges that he was an at-will employee. (Pl.'s Mem. of Law in Opp'n to Def.s' Mot. for Summ. J. at 1).

Plaintiff's documents articulated that Plaintiff would be paid on all "Builder Report Type 5" ("Report Type 5") loans generated in his territory. It must be noted that while Chemical's offer letter and both of Plaintiff's documents are silent as to the manner in which Plaintiff would earn commissions, the heart of Plaintiff's three claims is that his commission earnings "would be [based] on all builder business generated in the Eastern United States, regardless of whether [Plaintiff] was directly involved in generating said business." (Pl.'s Amend. Compl. ¶ 16). Plaintiff also claims, however, that other agreements were made as to his commission earnings. (See Pl.'s Amend. Compl. ¶ 17). Relying on these agreements, Plaintiff alleges that he entered an employment contract with Chemical on January 4, 1995. (Pl.'s Amend. Compl. ¶ 17). He was hired as the Regional Vice-President of the National Builder Services Division. (Pl.'s Amend. Compl. ¶ 2).

Plaintiff alleges that shortly after he commenced his employment with Chemical, he realized that he was being deprived of commission earnings because Chemical's internal, computerized tracking system for mortgage originations (the "PACS system") was defective.\[3] (Pl.'s Amend. Compl. ¶ 22). Plaintiff specifically claims that in order that he be paid all commissions earned as the parties agreed, local Chemical agents had to input the appropriate

[3]/ As previously stated, the PACS system is a computer program which tracks, inter alia, Report Type 5 business for the purpose of, inter alia, calculating commission earnings.

transaction codes into the PACS system; the appropriate code for Plaintiff's commissions was a Report Type 5. (Pl.'s Amend. Compl. ¶ 23). Plaintiff alleged that the local agents were not doing so and he was therefore deprived of commission payments owed him pursuant to his employment contract. (Pl.'s Amend. Compl. ¶ 24). Plaintiff complained of the alleged PACS system flaw to numerous Chemical employees, (Pl.'s Amend. Compl. ¶ 26.), including those employees Plaintiff believed to possess the authority to change the PACS system Plaintiff alleges that Chemical failed to remedy the PACS system's problem. (Pl.'s Amend. Compl. ¶ 27).

Chemical merged with Chase on April 1, 1996. (Pl.'s Amend. Compl. ¶ 28). At the time of the merger, Plaintiff's supervisor, Cleve Smith ("Smith"), stated that Plaintiff's compensation would accord with his original employment contract. (Pl.'s Amend. Compl. ¶ 29). Plaintiff alleges that after the merger, he was not paid in accordance with the terms of his employment contract. (Pl.'s Amend. Compl. ¶ 30). Plaintiff further alleges that Chase further breached his employment contract when it unilaterally changed his compensation structure. (Pl.'s Amend. Compl. ¶ 31). Plaintiff also alleges that in reliance on Smith's representations regarding Plaintiff's commissions, he rejected an offer of employment from GMAC.\[4] (Pl.'s Amend. Compl. ¶ 44). He alleges that Chase

[4]/ Plaintiff's Amended Complaint states that GMAC offer plaintiff a job. (Pl.'s Amend. Compl. ¶ 44). Plaintiff stated in his deposition testimony, however, that GMAC never offered him a job. (Pl.'s Dep. p. 941 at 18-20).

fraudulently misrepresented its intent with regard to fixing the

PACS system so as to induce Plaintiff to reject GMAC's job offer. (Pl.'s Amend. Compl. ¶¶ 47-52).

Plaintiff resigned from Chase and thereafter brought the instant action to recover, inter alia, allegedly earned but unpaid commissions and interest thereon, liquidated damages, fees and costs.

## II. DISCUSSION

### A. Legal Standard: Summary Judgment Under F.R.C.P. 56

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The party moving for summary judgment has the initial burden of showing the basis for its motion. Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S. Ct. 2548, 2553 (1986). Once the movant adequately supports its motion pursuant to Rule 56(c), the burden shifts to the nonmoving party to go beyond the mere pleadings and present evidence through affidavits, depositions, or admissions on file to show that there is a genuine issue for trial. See id. at 324. A genuine issue is one in which the evidence is such that a reasonable jury could return a verdict for the nonmoving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

When deciding a motion for summary judgment, a court must draw all reasonable inferences in the light most favorable to the nonmovant. Big Apple BMW, Inc. v. BMW of N. Am., Inc., 974 F.2d 1358, 1363 (3d Cir. 1992), cert. denied, 507 U.S. 912 (1993). Moreover, a court may not consider the credibility or weight of the evidence in deciding a motion for summary judgment, even if the quantity of the moving party's evidence far outweighs that of its opponent. Id. Nonetheless, a party opposing summary judgment must do more than rest upon mere allegations, general denials, or vague statements. Trap Rock Indus., Inc. v. Local 825, 982 F.2d 884, 890 (3d Cir. 1992).

**1. Count I: Breach of Contract**

Plaintiff claims that Defendants' failure to pay Plaintiff commissions on all Report Type 5 mortgage loans closed in his territory constitutes a breach of his employment contract. Defendants argue that there can be no such breach for Plaintiff was an employee at-will throughout his tenure at Chase, and that his at-will status precludes the Court from recognizing his claim.

Plaintiff admits that Defendants hired him as an at-will employee. (Pl.'s Mem. of Law in Opp'n to Def.s' Mot. for Summ. J. at 1). It is well settled under Pennsylvania law that a contract of employment that does not specify a definite duration of employment is presumed to be terminable at the will of either party. Pipkin v. Pennsylvania State Police, 693 A.2d 190, 191 (Pa.

1997). It is also clear that in the absence of an express agreement to the contrary, an employer is free to determine the terms and conditions of employment. Haberern v. Kaupp Vascular Surgeons Ltd. Defined Benefit Pension Plan, 24 F.3d 1491, 1497 (3d Cir. 1994); Green v. Edward J. Bettinger Co., 608 F. Supp. 35, 40 (E.D. Pa. 1984).

The instant matter does not concern the termination of an employment relationship but rather concerns the commissions allegedly due Plaintiff under his alleged employment contract. The issue therefore is whether there was an enforceable contract between the parties which entitles Plaintiff to collect commissions allegedly owed him.

The Court realizes and thereby agrees with Plaintiff that every employment relationship is contractual in nature. Woo v. Centocor, Inc., No. CIV.A. 95-3900, 1995 WL 672389, at *3 (E.D. Pa. Nov. 9, 1995); Volk v. Pribonic, No. CIV.A. 94-2165, 1995 WL 360186, at *2 (W.D. Pa. April 11, 1995). Nevertheless, such a "contractual nature" does not transform an express at-will relationship into one where Plaintiff is guaranteed rights under law that do not exist otherwise in such an employment relationship. Plaintiff alleges that although he was an at-will employee, he had a contract with Defendants regarding his commission earnings. (See Pl.'s Amend. Compl. ¶ 15).

On January 4, 1995, Defendants mailed to Plaintiff a letter

offering him employment. (See Def.s' Ex. 3). Defendants' letter set forth Plaintiff's terms of compensation, expressly stating that "[t]his commission program is subject to review and revision from time to time at [Defendants'] discretion.\[5] (Def.s' Ex. 3). Plaintiff commenced his employment on or about January 17, 1995, and sought that same day to clarify how his commissions were to be earned and paid. (See Def.s' Ex. 8 at 8:14 - 9:23, 27:21 - 28:8). Defendants claim that Plaintiff was informed that he would receive commissions for all Report Type 5 loans closed in his territory and reported through the PACS system. (See Def.s' Ex. 8 at 8:14 - 9:23, 27:21 - 28:8 (emphasis added)). Plaintiff claims that his understanding of his compensation package was that he was to be paid commissions on all Report Type 5 loans closed in his territory. (See Pl.'s Amend. Compl. ¶ 16). Thus, upon consideration of the pleadings, depositions, and admissions on file, the Court holds that summary judgment is improper for there exists a genuine issue of material fact as to Plaintiff's breach of contract claim. Defendants' Motion for Summary Judgment is therefore denied on said claim.

**2. Count II: Fraud**

Plaintiff brings a fraud claim under Pennsylvania law. To

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[5]/ Said letter also states that upon acceptance of Defendants' offer, Plaintiff's employment will be at-will, asserting that "[e]mployment will be at our mutual pleasure." (Def.s' Ex. 3).

state a claim for common law fraud under Pennsylvania law, Plaintiff must allege the following: (1) a misrepresentation; (2) a fraudulent utterance thereof; (3) an intention by the maker that the recipient will thereby be induced to act; (4) justifiable reliance by the recipient upon the misrepresentation; and (5) damage to the recipient as the proximate result. Hemispherx Biopharma, Inc. v. Asenio, No. CIV.A. 98-5204, 1999 WL 144109, at *8 (E.D. Pa. March 15, 1999) (citations omitted). Plaintiff's allegations must be supported by clear and convincing evidence. Trans Penn Wax Corp. v. McCandless, 50 F.3d 217, 232 (3d Cir. 1995); Snell v. State Examining Bd., 416 A.2d 468, 470 (Pa. 1980); Krause, 563 a.2d at 1187. Additionally, to recover on a fraud claim, Plaintiff must demonstrate actual or pecuniary loss. See Rade v. Transition Software Corp., No. CIV.A. 97-5010, 1998 WL 767455, at *7 (E.D. Pa. Oct. 30, 1998).

Plaintiff alleges that Defendants fraudulently induced Plaintiff to forego an employment opportunity with GMAC, Plaintiff's former employer, when it misled Plaintiff as to its intent to pay Plaintiff commissions "on all builder business, regardless if [Plaintiff] directly produced the business." (Amend. Compl. ¶ 42). Plaintiff also alleges that Defendant represented that the PACS system would be remedied and that Plaintiff was "guaranteed accurate commission summaries." (Amend. Compl. ¶ 43).

Defendants argue, inter alia, that Plaintiff cannot offer

clear and convincing evidence as required by Pennsylvania law, see Krause v. Great Lakes Holdings, Inc., 563 a.2d 1182, 1187 (Pa. 1989), to support his fraud claim. Whether or not the plaintiff has produced "clear and convincing" evidence to support his claim of fraud can best be evaluated by the Court at trial in response to a Rule 50 motion.

Therefore, upon consideration of the pleadings, depositions, and admissions on file, the Court holds that summary judgment is inappropriate for Plaintiff's fraud claim. Accordingly, Defendants' Motion for Summary Judgment is denied on said claim.

**3. Count III: Pennsylvania Wage Payment and Collection Law**

Plaintiff claims that Defendants' failure to pay the commissions allegedly owed him is unlawful under the WPCL.\[6] The WPCL provides:

> Whenever an employer separates an employe from the payroll, or whenever an employe quits or resigns his employment, the wages or compensation earned shall become due and payable not later than the next regular payday of his employer on which such wages would otherwise be due and payable..

43 Pa. Cons. Stat. Ann. § 260.5(a) (West 1999). "Wages," by definition, include "all earnings of an employe, regardless of whether determined on time, task, piece, or commission . . . " 43 Pa. Cons. Stat. Ann. § 260.2(a) (West 1999). The WPCL does not create a right to compensation but instead offers "additional

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[6]/ The Court notes that Plaintiff failed to allege a violation of a particular WPCL section, leaving such determination to the Court's discretion.

protections to employees by providing statutory remedies for the employer's breach of its contractual obligation to pay wages." Sendi v. NCR Comten, Inc., 619 F. Supp. 5787, 1579 (E.D. Pa. 1985) (citations omitted). It is therefore the parties' contract that governs whether specific commissions were earned by Plaintiff. See id.

Accordingly, having already found that there is a genuine issue of material fact as to whether such a contract existed between the parties, there also is a genuine issue of material fact as to whether Plaintiff is entitled to collect commissions pursuant to said contract under the WPCL. Therefore, the Court denies Defendants' Motion for Summary Judgment on Plaintiff's WPCL claim.

An appropriate Order follows.

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**O R D E R**

AND NOW, this 28th day of October, 1999, upon consideration of Defendants' Motion for Summary Judgment (Docket No. 9), Plaintiff's Response to Defendants' Motion for Summary Judgment (Docket No. 15), Plaintiff's Sur Reply to Defendants' Motion for Summary Judgment ((Docket No. 18), and Defendants' Reply Memorandum of Law in Support of Motion for Summary Judgment (Docket No. 21), IT IS HEREBY ORDERED that:

(1) the Defendants' Motion is **DENIED** as to Plaintiff's breach of contract claim;

(2) the Defendants' Motion is **DENIED** as to Plaintiff's fraud claim; and

(3) the Defendants' Motion is **DENIED** as to Plaintiff's WPCL claim.

BY THE COURT:

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HERBERT J. HUTTON, J.